

Before The
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	
)	
LRB BROADCASTING)	File No. BPH-901218MI
)	
DAVID L. WOLFE)	File No. BPH-901219MI
)	
ZENITRAM COMMUNICATIONS, INC.)	File No. BPH-901220MG
)	
For a Construction Permit For a)	MM Docket No. 92-61
New FM Station on Channel 288A)	
in Brockport, New York)	

To: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

David Wolfe ("Wolfe"), by his attorneys, hereby opposes the Application For Review filed by Zenitram Communications, Inc. ("Zenitram") on November 6, 1992, in which Zenitram seeks review of the decision of the Review Board which upheld the action of the Presiding Judge dismissing the Zenitram application for failure to prosecute. In support thereof, it is shown as follows:

I. BACKGROUND

1. After carefully reviewing the arguments of Zenitram in its Appeal, the Review Board held that the ALJ was justified in dismissing the Zenitram application for failure to prosecute. The Board found that the ALJ correctly held that Zenitram failed to demonstrate good cause for its late-filed notice of appearance, and that, additionally, Zenitram's failure to timely produce documents pursuant to Section 1.325(c)(1) and (2) of the Rules prejudiced the discovery rights of the competing applicants.

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2. Zenitram argues in its Application For Review that the ALJ and the Board erred in finding that it had failed to demonstrate good cause for the late-filing of its Notice of Appearance ("NOA"), that the Board considered basic qualifications issues which were not at issue, that the ALJ and the Board erred in failing to address whether it had paid its hearing fee, and, that the Board failed to apply Commission precedent regarding attorney nonfeasance.

II. Issues Presented

A. Whether the Review Board Correctly Concluded That Zenitram Had Failed to Show Good Cause For its untimely filing of its Notice of Appearance and whether that untimely filing Untimely filing, Standing Alone, Warranted Dismissal of the Zenitram Application.

B. Whether the Failure to Timely Produce the Documents Required by Section 1.325(c)(1) of the Rules and the Integration Statement Required by Section 1.325 (c)(2) of the Rules Provided Further Grounds For Dismissal of the Zenitram Application.

III. ARGUMENT

3. The factors that should be considered in reviewing the dismissal of an application from a comparative hearing were set forth by the United States Court of Appeals in Comuni-Centre B/casting, Inc. v. FCC, 856 F.2d 1551, 1554 (D.C. Cir. 1988). The factors are: (1) the applicant's proffered justification for the failure to comply with the presiding judge's order; (2) the prejudice suffered by other parties; (3) the burden placed on the administrative system; and, (4) the need to punish abuse of the system and to deter future misconduct.

4. Zenitram argues that it has made a sufficient showing with regard to these

factors. It asserts that it has provided justification for its untimely filings in that it had arranged for a courier service to timely file the NOA and the courier had failed to do so, and, because it had filed an NOA and paid its hearing fee in July 1991, and, therefore its failure to file the NOA required by the HDO was "a relatively minor technicality". It asserts that there was no prejudice to other parties because its failure to meet the document production deadline set forth in the HDO, and the service of document production materials twenty-two days late, was of no consequence because its late-filed Integration Statement had been rejected by the ALJ and, therefore, "no further discovery against Zenitram was necessary or appropriate". It argues that there was no burden on the administrative system because the only burden has been reviewing the motion to dismiss and writing the dismissal order. Finally, it is asserted that there is no need to punish abuse because there was no intent to abuse.

5. The Zenitram analysis is inaccurate as to the facts and the law. In his Memorandum Opinion and Order, released June 12, 1992, FCC 92M-688, in dismissing the Zenitram application, the ALJ pointed out that the Hearing Designation Order (HDO) released April 13, 1992, which was served on all parties and their counsel, notified parties that they must file a Notice of Appearance within 20 days of the mailing of the HDO and that a standard Document Production and a Standard Integration Statement must be exchanged five days thereafter. The ALJ also noted that the HDO stated that:

"Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application"

6. Four days after the release of the HDO, the ALJ's Prehearing Conference Order, FCC 92M-473, was released which again referred to the need for a Notice of Appearance, and the Standard Document Production, and the Standard Integration Statement. The ALJ reminded the parties that:

"... failures to comply with procedural and discovery orders of the Presiding Trial Judge may result in dismissal".

7. In his Memorandum Opinion and Order released June 12, 1992, dismissing the Zenitram application, the ALJ relied on the fact that:

"Zenitram has failed to file a Notice of Appearance and to exchange required documents on time and has not offered a credible excuse".

8. The ALJ rejected Zenitram's "good cause" argument that the late filing of the NOA should be excused simply because of its claim that the NOA along with other material had been placed in the hands of a courier service which did not make the timely filing, and, which "inexplicably" held the package for two weeks at the airport without notifying counsel. In rejecting the "good cause" argument, the ALJ noted that no affidavit from the "allegedly delinquent courier" nor any copy of any invoice, receipt, or bill of lading was provided. In fact, the courier service was never identified. Zenitram claimed that the ALJ and the other parties had been timely served with the NOA, without stating the date of the service. The ALJ pointed out that his record showed that he had not received a copy by May 4, 1992. Zenitram asserts that the ALJ's dismissal was clearly based, at least in part, upon the premise that Zenitram had not paid its hearing fee.

However, the ALJ only pointed out that no copy of a canceled check was provided and that the public notice listing NOA's and fee payments for the relevant period failed to reflect a payment by Zenitram, but, the ALJ then stated: "In any event, the new procedures require an NOA after the case is set for hearing and Zenitram was required to follow the rules." 9. The Judge also found it noteworthy (para. 8) that in its opposition to the dismissal motion, Zenitram made no mention of the fact that also it had failed to meet the document production deadline. Further, Zenitram was late in filing its Integration Statement. It should be noted in connection with the late filing of the Integration Statement, which the ALJ dismissed by separate order, that Zenitram contends that the package was given to the post office on the evening of May 11th but that the post office placed the wrong date on the envelope when the filing was postmarked. However, the Presiding Judge pointed out that the claim is suspect because on the envelope serving the Integration Statement on counsel for LRB Broadcasting there was a dated postage meter stamp showing May 12, and, in addition a post office postmark indicating that the envelope was postmarked May 12 "PM". The Zenitram explanation on the filing of the Integration Statement, and its claims concerning the postmark, has all of the earmarks of a complete fabrication which not only justified rejection of the Integration statement but which also warranted reliance on that late filing as a further basis for dismissal. Zenitram's reliance on the ALJ's fee discussion is misplaced.

10. Despite the fact that it is normal practice for courier services to immediately report any delivery delays, Zenitram repeats its claim that "the package containing the

NOA was not only not delivered by 5:30, but was also inexplicably held by the courier at Washington's National Airport for two weeks". Zenitram again fails to provide any evidence to support its claim. It has never provided any statement from the courier service or any bill of lading or receipt, or even the identity of the courier service.

11. In its discussion of the late-filed document production, the Board pointed out that Zenitram's discovery defaults "prejudiced the discovery rights of the competing applicants" because the required documents included those relevant to its basic financial and transmitter site qualifications. Zenitram argues that this discussion was error because "there were no pending issues regarding those matters". This argument ignores the fact that the purpose of the standard document production is to enable other parties to the proceeding to request additional issues if there are questions raised by the documents.

12. Zenitram also alleges that the Board and the ALJ failed to apply precedent "which would have supported good cause for the acceptance of the NOA." It argues that the Board ignored precedent "which excuses an untimely filing attributable to attorney malfeasance". It cites Nancy Naleszkiewicz, 7 FCC Rcd 1797, 1799 (1992) and states that it "falls precisely into the Naleszkiewicz precedent". However, the Board pointed out that Naleszkiewicz was not a comparative case subject to the stricter standards mandated by the comparative procedural reforms. In that case, the Commission stated that "the considerations that militate for strict enforcement of the deadline in comparative cases * * * are not present in this single-applicant proceeding."

13. The Board also discussed the attorney inattention argument and pointed out

that the ALJ relied on Hillebrand Broadcasting, Inc. 1 FCC Rcd 419, 420 n 6 (1986) and Silver Spring Communications, 3 FCC Rcd 5049 (Review Bd 1988), rev. denied, 4 FCC Rcd 4917 (1989), which are applicable "whether the courier, counsel or applicant were at fault." The Board also cited Commission Public Notice; 58 RR 2d 1706, 1707 (1985) which stated that:

"...in the future, applicants who wait until the eleventh hour to meet Commission deadlines will be held to assume the risk for almost all events which may occur to prevent timely filing. To minimize the risk, applicants should build into their schedules a reasonable margin of error in anticipation of circumstances which may cause delay..."

14. In CSJ Investments, Inc., 68 RR 2d 897 (1990) the Commission sustained the dismissal of an FM applicant which failed to file its hearing fee and a notice of appearance. The Commission stated (68 RR 2d at 899):

"Key West next contends that the ALJ's dismissal of its application is inconsistent with the Commission's policy of permitting as many qualified applicants as possible to compete in comparative licensing proceedings, thereby ensuring that the best qualified applicant is selected. The Commission, however, now gives greater emphasis to the discretion accorded ALJ's in determining appropriate procedures to facilitate the prompt performance of their responsibilities and applicants have a high burden to justify an exception to the procedural deadlines uniformly applied by the ALJ to all applicants in the proceeding.

....

Given the above, we believe the ALJ had no choice but to dismiss the application in view of Key West's failure to pay the hearing fee on January 19, as it promised; indeed, to have held otherwise would have been clear abuse of discretion. A similar result was likewise required in light

of Key West's failure to file its notice of appearance on January 19. In this regard, 47 CFR sec. 1.221(c) provides that applications will be dismissed for failure to prosecute when applicants fail to file timely their written notices of appearance. Silver Springs Communications, 3 FCC Rcd 5049 [65 RR 2d 426] (Rev Bd 1988), rev. den, 4 FCC Rcd 4917 (1989)" (emphasis supplied).

CONCLUSION

15. Zenitram states that dismissal is inordinately harsh and states that it "could not have foreseen a series of bizarre coincidences, or the sudden incapability of its attorney to effectively prosecute its application (whichever the case may be)". It does not identify what it means by "bizarre coincidences". One fact that is clear is that the number of Zenitram late filings was substantial and beyond the filing failures in the cited cases. There has been a pattern of dilatory conduct by Zenitram:

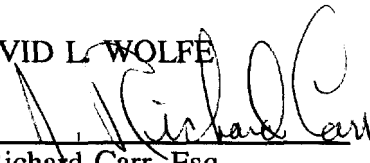
- a) The Notice of Appearance was due on May 4, 1992. Zenitram did not file its notice until May 18, 1992, 14 days late, allegedly due to courier error.
- b) The Standard Document Production by all parties was due on May 11, 1992. Zenitram did not exchange documents until June 2, 1992, 22 days late. No explanation was offered.
- c) The Standard Integration Statement by all parties was due on May 11, 1992. Zenitram did not file until May 12, 1992, allegedly due to a post office mistake which claim is contradicted by the post marks on the envelope sent to counsel.

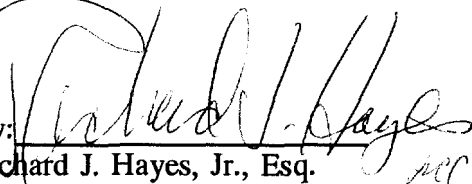
The Board's affirmance of the ALJ's dismissal of the Zenitram application was fully warranted by the facts. There are no equitable or legal bases for reversing the Board.

Wherefore, in view of the foregoing it is submitted that the Commission should affirm the Review Board decision affirming the Zenitram dismissal and deny the Zenitram Application for Review.

Respectfully submitted,

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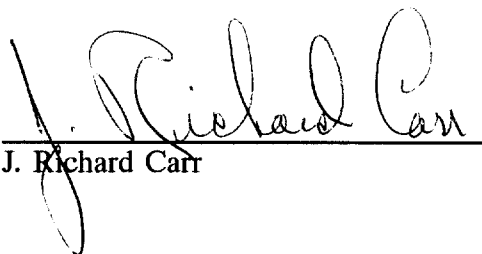
CERTIFICATE OF SERVICE

I, J. Richard Carr, hereby certify that copies of the foregoing "Opposition to Application for Review" were sent via first class mail, postage prepaid, or as otherwise indicated, to each of the following on this 23rd Day of November, 1992:

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